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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GUADALUPE YOLANDA GOMEZ, Appellant.	)	2 CA-CR 2007-0239 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054824

Honorable Frank Dawley, Judge Pro Tempore

REVERSED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Guadalupe Gomez was convicted of child abuse and placed on ten years' probation. On appeal, she argues there was insufficient evidence to support her conviction, the trial court erred in instructing the jury, and the offense of which she was convicted was not a lesser included offense of the crime with which she was charged. Because we find Gomez's conviction was not supported by sufficient evidence, we reverse her conviction and sentence without addressing her additional arguments. *See State v. Walden*, 126 Ariz. 333, 335, 615 P.2d 11, 13 (App. 1980) (appellate court need not consider issues rendered moot).

Factual and Procedural Background

¶2 Gomez served as the foster mother to D., a boy born prematurely in July 2005 to a mother who had taken cocaine during her pregnancy. When the state placed D. with Gomez, an experienced and licensed foster parent, D. was nearly four months old and appeared to be in relatively good health. A week later, on Saturday, November 12, 2005, Gomez delivered D. to a licensed residential daycare center. From there, an agent of Child Protective Services delivered him to a supervised visit with his biological parents. After D. returned from the visit, the daycare provider noted D. did not want to eat very much, and she expressed her concern to Gomez.

¶3 Later that weekend and into Monday morning, D. vomited, ate less, and slept more frequently. Gomez also observed D.'s eyes roll back in his head. On Monday, she scheduled an appointment with D.'s doctor at the earliest available time, which was

Wednesday morning, and called a nurse at the children's crisis shelter where D. previously had stayed. The nurse suggested Gomez bring D. to the shelter's medical clinic or try to schedule an earlier appointment. Gomez did neither. At daycare on Monday, D. "was always asleep" and did not want to eat. On Wednesday, Gomez took D. to the doctor's office and calmly waited to be seen. She was visibly upset in the examination room when it was discovered that D. was not breathing and had no heartbeat.

¶4 Medical testimony showed that D. had died roughly an hour earlier from "cranial cerebral injuries due to blunt force trauma of the head." An autopsy showed D. had skull fractures above his ears and bleeding inside the skull. These injuries were "more than . . . two, three days old but less than a week." There were no external signs of trauma.

¶5 A grand jury charged Gomez with first-degree murder and two counts of child abuse: one for causing D.'s injuries, the other for endangering D. "by failing to seek prompt medical attention." The state moved to dismiss the murder charge at the beginning of the trial, and the court granted the motion. And, after the close of the state's evidence, the court granted Gomez's motion for judgment of acquittal on the child abuse charge alleging that she had caused D.'s injuries.[1] The jury then found Gomez guilty of reckless child abuse

[1]At the beginning of trial, the court had merged the child abuse charges into one count and presented them to the jury as alternative theories of liability. Nonetheless, the trial court later found that the state had presented insufficient evidence to show Gomez "intentionally or knowingly caused the physical injury to D[.]" and granted an acquittal as to this portion of the amended indictment. We do not address the propriety of such a consolidation.

under A.R.S. § 13-3623(B)(2) for her failure to seek timely medical treatment. This appeal followed.

Discussion

¶6 Gomez argues the state presented insufficient evidence to convict her of child abuse under A.R.S. § 13-3623(B)(2). The statute provides, *inter alia*, that a person is guilty of a class five felony if he or she recklessly "[u]nder circumstances other than those likely to produce death or serious physical injury . . . causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is *endangered*." *Id*. (emphasis added). Gomez claims the state did not show she endangered D. by failing to seek prompt medical attention for him because it presented no evidence that his condition could have been treated had she done so.[2] The state counters that the jury could rely on common sense to conclude the child was endangered by Gomez's delay. Because we agree with Gomez that the state failed to present any evidence her actions increased the risk of harm to D., we reverse her conviction for child abuse.

¶7 We review the sufficiency of evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We will affirm a conviction if it is supported by substantial evidence. *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994).

[2]Although Gomez concedes she did not articulate this ground when urging her motion for a judgment of acquittal, we nonetheless consider the merits of her argument because a conviction not sustained by sufficient evidence constitutes fundamental error. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005).

"Substantial evidence is evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Cox*, 217 Ariz. 353, ¶22, 174 P.3d 265, 269 (2007), *quoting State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). In assessing whether the state has presented substantial evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998).

¶8 As this court held in *State v. Mahaney*, 193 Ariz. 566, ¶ 15 & n.4, 975 P.2d 156, 158-59, & 159 n.4 (App. 1999), the legislature intended to use the term "endangered" in § 13-3623 in its ordinary sense,[3] meaning "to expose to potential harm" greater than that risked in everyday life. The state need not prove that a risk of harm is substantial or that the potential for danger is immediate in order to secure a conviction under this statute. *Mahaney*, 193 Ariz. 566, ¶ 16, 975 P.2d at 159. Endangerment, however, remains an element of the type of child abuse Gomez was charged with under § 13-3623(B).

¶9 Accordingly, when the state alleges that a caretaker has endangered a child by failing to obtain prompt medical treatment for injuries, the state must prove that the delay increased the child's risk of harm. *See, e.g., Mahaney*, 193 Ariz. 566, n.4, 975 P.2d at 159 n.4 (finding sufficient evidence of endangerment where "ample medical testimony" showed

[3]The subsections referred to in *Mahaney* as (B) and (C) of § 13-3623 became current subsections (A) and (B), following a 2000 amendment to the statute. *See* 2000 Ariz. Sess. Laws, ch. 50, § 4.

deprivation of anti-seizure medication "exposed [child] to a high possibility of reseizing, which could have caused serious and permanent injury"); *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995) (finding sufficient evidence of endangerment where testimony that child's chance of survival would have improved if she had gone to hospital sooner). Here, the state's medical experts addressed only the nature of D.'s injuries, his symptoms, and the cause of his death. The state presented no evidence regarding the treatment D. would have received if he had been examined earlier, nor what effect, if any, the delay had on D.'s prognosis.[4] Thus, the state presented no evidence that Gomez's delay in seeking medical attention for D.—however negligent that delay may have been—increased D.'s risk of harm.

¶10 Nonetheless, the state contends that Gomez herself agreed that D. might have been saved had he received medical attention sooner. Specifically, the state directs us to Gomez's summation wherein her counsel observed that "had the baby been taken to the doctor sooner . . . perhaps earlier intervention would have helped and perhaps this baby could have survived." But arguments by counsel are not evidence. *State v. Robinson*, 127 Ariz. 324, 329, 620 P.2d 703, 708 (App. 1980). Moreover, the record of Gomez's summation as a whole does not support the state's characterization of those comments.

[4]The nurse who advised Gomez to seek earlier treatment testified that she did so because Gomez sounded concerned, not because the symptoms Gomez described indicated an urgent need for medical attention.

Gomez's counsel prefaced those remarks with the word "perhaps" and emphasized immediately thereafter that any such conclusion would itself be speculation.

¶11 We also disagree with the state's contention that common-sense assumptions and inferences permitted the jury to find that Gomez endangered D. Although jurors may rely on common sense and experience in their deliberations, *State v. Aguilar*, 169 Ariz. 180, 182, 818 P.2d 165, 167 (App. 1991), jurors are not presumed to know the capabilities and limitations of modern medicine, and their speculation concerning the risks and possible outcomes of traumatic injuries cannot substitute for substantial evidence on such matters. *See, e.g., State v. George*, 206 Ariz. 436, ¶¶ 4-5, 79 P.2d 1050, 1054 (App. 2003) (in the absence of medical testimony, jury could not infer that gunshot wound to neck created "reasonable risk of death" and was therefore a "serious physical injury"); *see also State v. Bennett*, 213 Ariz. 562, ¶¶ 24, 28-29, 146 P.3d 63, 68-69 (2006) (where state needed to show that delay in treatment was a cause of child's death from head trauma, equivocation of lone medical expert created colorable claim of insufficient evidence). Because the availability and efficacy of treatment for cranial-cerebral injuries in infants is not within the common experience and knowledge of the jury, the state was required to present evidence from which the jury could conclude without speculation that Gomez's delay in seeking treatment had endangered D. *See State v. Sanchez*, 181 Ariz. 492, 494, 892 P.2d 212, 214 (App. 1995) (speculation alone cannot support jury's determination of guilt).

¶12 We, like the jury in this case, are tempted to conclude that D. would have benefitted from more immediate medical attention and that such attention had the potential to save his life. And, we suspect the state would have had little difficulty eliciting expert testimony from at least one of its witnesses that Gomez's delay increased D.'s risk of harm.[5] We merely hold today, as we did in *George*, that the state must present such evidence. Because it failed to do so, Gomez's conviction was not supported by substantial evidence.

Conclusion

¶13 We therefore reverse Gomez's conviction for child abuse.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge

[5]The state's witnesses included two registered nurses, three pediatricians, two of whom attempted to resuscitate D., and the chief medical examiner for Pima County.